

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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SHERIE WHITE,

NO. CIV. S 03-2402 MCE KJM

Plaintiff,

v.

MEMORANDUM AND ORDER

SAVE MART SUPERMARKETS dba  
FOOD MAXX; WRI GOLDEN STATE,  
LLC; and DOES 1 through 10,

Defendants.

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Through the present motion, Plaintiff Sherie White ("Plaintiff") seeks attorney's fees and litigation expenses, pursuant to both state law and 42 U.S.C. § 12205 of the Americans with Disabilities Act ("ADA"), following her settlement with Defendant SaveMart Supermarkets dba Food Maxx ("SaveMart") for violations of Title III of the ADA pertaining to SaveMart's facility located at 1330 Churn Creek Road in Redding, California. Plaintiff requests \$11,211.25 for fees incurred by various attorneys and paralegals, and \$5,927.64 in costs and litigation

1 expenses, for a total of \$17,138.89. Save Mart opposes  
2 Plaintiff's motion, claiming that the fees and expenses sought  
3 are unwarranted, unreasonable and/or excessive.

4  
5 **BACKGROUND**  
6

7 This dispute arises from Plaintiff's claim that she  
8 encountered various architectural barriers when attempting to  
9 visit SaveMart's Redding facility. Plaintiff is a quadriplegic  
10 unable to walk, stand or use her arms. Plaintiff must use an  
11 electronic wheelchair when traveling about in public.

12 Plaintiff filed her complaint against Save Mart on November  
13 18, 2003. Thereafter, her counsel conducted site assessments of  
14 the Save Mart facility and had a report prepared which listed  
15 some thirty-nine (39) separate ADA violations within that  
16 facility. In August of 2005, Plaintiff and SaveMart entered into  
17 a settlement agreement pursuant to which SaveMart agreed to pay  
18 Plaintiff damages in the amount of \$4,000 and to remedy certain  
19 of the claimed ADA violations. Prior to settling the case,  
20 Plaintiff dropped her demands pertaining to many of the alleged  
21 violations identified in the site report prepared by her expert.  
22 Specifically, Plaintiff did not pursue some eighteen (18) claims  
23 pertaining to deficiencies involving the men's restroom.

24 Since the parties also agreed that the Court would retain  
25 jurisdiction to hear Plaintiff's request for fees and expenses,  
26 the present motion was filed on September 14, 2005.

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**STANDARD**

Plaintiff's complaint alleged violations of federal and California law. Plaintiff's federal claim arose under the ADA, while her state law claims arose under the California's Unruh Act, Cal. Civ. Code § 51, California Health & Safety Code § 19953, and the California Disabled Persons Act, Cal. Civ. Code § 54-55.

Section 12205 of the ADA authorizes a court, in its discretion, to "allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs . . . ." 42 U.S.C. § 12205. A prevailing plaintiff under a statute so worded "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." Barrios v. Cal. Interscholastic Fed'n, 277 F.3d 1128, 1134 (9<sup>th</sup> Cir. 2002), quoting Hensley v. Eckerhart, 461 U.S. 424, 429 (1983). A plaintiff who enters a legally enforceable settlement agreement is considered a prevailing party. Id.

Section 55 of the California Disabled Persons Act provides that "the prevailing party in the action shall be entitled to recover reasonable attorney's fees." Cal. Civ. Code § 55. Also, under California Health & Safety Code § 19953, "[a]ny person who is aggrieved or potentially aggrieved by a violation of this part . . . may bring an action to enjoin the violation. The prevailing party in the action shall be entitled to recover

1 reasonable attorney's fees."

2  
3 **ANALYSIS**  
4

5 SaveMart does not dispute that this Court has discretion to  
6 award Plaintiff, as the prevailing party in this litigation, both  
7 attorneys' fees, as well as litigation expenses and costs, in  
8 pursuing her case. Rite Aid nonetheless asserts that the Court  
9 should exercise its discretion in determining that, under the  
10 circumstances present, those fees and expenses should either be  
11 disallowed in their entirety or significantly reduced.

12 SaveMart first asks the Court to follow the Central  
13 District's recent decision in Doran v. Del Taco, Inc., 373 F.  
14 Supp. 2d 1028 (C.D. Cal. 2005), which denied attorneys' fees in  
15 an ADA case where the plaintiff had neither provided pre-  
16 litigation notice of his intent to sue nor afforded the  
17 defendant, prior to suit, a reasonable opportunity to cure any  
18 alleged violations. As even the Doran court recognized,  
19 however, there is no Ninth Circuit precedent requiring an ADA  
20 plaintiff to provide notice before filing suit. Id. at 1031.  
21 Indeed, in Botosan v. Paul McNally Realty, 216 F.3d 827, 832 (9<sup>th</sup>  
22 Cir. 2000), the Ninth Circuit held squarely to the contrary.  
23 Moreover, as Doran further concedes, repeated efforts by Congress  
24 to amend the ADA to provide pre-suit notice have uniformly  
25 failed. Id. Consequently, even assuming Plaintiff failed to  
26 provide SaveMart with adequate notice of its ADA shortcomings  
27 before instituting this lawsuit, the Court declines to rely on  
28 the reasoning of Doran in altogether denying Plaintiff's instant

1 request for fees/expenses.

2       This Court must therefore determine the extent to which  
3 attorneys' fees and litigation expenses are recoverable. In  
4 making that assessment, the Court must identify the applicable  
5 "lodestar" for calculating attorneys' fees. Under the lodestar  
6 method, a court multiplies the number of hours the prevailing  
7 attorney reasonably expended on the litigation by a reasonable  
8 hourly rate. See Hensley, 461 U.S. at 433; see also Ketchum v.  
9 Moses, 24 Cal. 4th 1122, 1132 (2001) (expressly approving the use  
10 of prevailing hourly rates as a basis for the lodestar). Courts  
11 may then adjust the lodestar to reflect other aspects of the  
12 case. See Kerr v. Screen Extras Guild, Inc., 526 F.2d 67, 70  
13 (9th Cir. 1975); see also Serrano v. Priest, 20 Cal. 3d 25  
14 (1977). That adjustment can go either upwards or downwards  
15 depending on the circumstances present. Van Gerwen v. Guar. Mut.  
16 Life Co., 214 F.3d 1041, 1045 (9<sup>th</sup> Cir. 2000).

17       Turning first to the number of hours reasonably billed, the  
18 Court finds that the amounts claimed by Plaintiff for certain  
19 tasks are unreasonable and must be adjusted accordingly. As  
20 SaveMart points out, Plaintiff's counsel has filed literally  
21 hundreds of ADA lawsuits similar to this one. Those cases share  
22 similar pleadings, discovery requests and motions. Certain of  
23 the documents generated in this matter are almost identical to  
24 those generated in other cases, and the reasonable fee claimed by  
25 Plaintiff's counsel in performing those tasks must therefore be  
26 reduced. After analyzing the billing entries generated by  
27 Plaintiff's counsel, along with evidence submitted by SaveMart,  
28 the Court finds that a total of 4.55 hours billed by attorney

1 Lynn Hubbard at \$250/hour are not reasonable, and that a further  
2 3.0 hours of paralegal time at \$75/hour is also not reasonable.  
3 Consequently \$1,137.50 will be deducted from the total attorneys'  
4 fees sought on behalf of Plaintiff.

5 While SaveMart also claims that hours expended by paralegals  
6 in this matter are not legally compensable, and hence are  
7 unreasonable, that is incorrect. Paralegal time has been  
8 consistently deemed compensable by federal courts if the local  
9 practice is to separately bill clients for paralegal services.  
10 See, e.g., Missouri v. Jenkins, 491 U.S. 274, 285-87 (1989);  
11 United Steelworkers of America v. Phelps Dodge Corp. 896 F.2d  
12 403, 407-08 (9<sup>th</sup> Cir. 1990). The defense has not disputed that  
13 paralegal services are so billed, and accordingly the hours spent  
14 are deemed reasonable.<sup>1</sup>

15 The above analysis all pertains to the reasonableness  
16 of the number of hours for which compensation is sought. The  
17 second step of the lodestar analysis requires that the rate  
18 sought to be charged per hour also be reasonable. Courts  
19 generally calculate reasonable hourly rates according to the  
20 prevailing market rates in the relevant legal community. Blum v.  
21 Stenson, 465 U.S. 886, 895 (1984). The general rule is that  
22 courts use the rates of attorneys practicing in the forum  
23 district, in this case, the Eastern District of California.  
24 Gates v. Deukmejian, 987 F.2d 1392,1405 (1993); Davis v. Mason

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26 <sup>1</sup>Save Mart does argue that certain paralegal costs should be  
27 disallowed because they were "clerical/secretarial" in nature.  
28 The Court declines, however, to parse the paralegal tasks  
performed that closely and will permit reimbursement of the  
amounts claimed by Plaintiff for paralegal services

1 County, 927 F.2d 1473, 1488 (9th Cir. 1991), *cert. denied* 502  
2 U.S. 899 (1991).

3 The burden is on the fee applicant to produce satisfactory  
4 evidence that the requested rates are "in line with those  
5 prevailing in the community for similar services by lawyers of  
6 reasonably comparable skill, experience and reputation." Blum,  
7 465 U.S. at 895 n.11. A court will normally deem a rate  
8 determined this way to be reasonable. Id.

9 While the Court agrees with Plaintiff that the both the  
10 \$250/hour rate sought on behalf of attorney Lynn Hubbard is  
11 reasonable, and further concurs that the rate of \$75/hour claimed  
12 for paralegal services is also reasonable, it does not agree that  
13 \$175/hour, as sought for associate attorney Scott Hubbard's time,  
14 is reasonable. Courts in this district have generally limited  
15 associate attorney compensation to \$150 per hour in cases of this  
16 nature. See, e.g., Loskot v. USA Gas Corporation, CIV. S-01-2125  
17 WBS KJM (E.D. Cal. April 26, 2004); Pickern v. Marino's Pizza &  
18 Italian Rest., CIV. S-01-1096 WBS GGH (E.D. Cal. April 9, 2003);  
19 Loskot v. Pine Street Sch. Off. Bldg., CIV. S-00-2405 DFL JFM  
20 (E.D. Cal. Nov. 7, 2002). Consequently, the 7.85 hours sought  
21 for Scott Hubbard's services should be reduced from \$1,373.75 to  
22 \$1,177.50, for a total net reduction of \$196.25 from the  
23 attorneys' fees claimed herein.

24 As outlined above, after deducting time not deemed by the  
25 Court to have been reasonably expended in this matter  
26 (\$1,137.50), and after adjusting the hours claimed to a  
27 reasonable hourly rate (for an additional deduction of \$196.25  
28 from the originally claimed total of \$11,211.25 in attorney and

1 paralegal fees), a lodestar figure for professional fees in this  
2 matter is calculated to be \$9,877.50. SaveMart claims this  
3 figure should also be reduced to reflect the fact that Plaintiff  
4 ultimately abandoned many of the ADA compliance demands she  
5 initially made in connection with this case. Specifically, of  
6 some thirty-nine (39) different claimed violations identified in  
7 Plaintiff's expert report as constituting disability access  
8 violations, Plaintiff dropped eighteen (18) before deciding to  
9 settle this case. Those eighteen (18) alleged violations all  
10 pertained to claimed inadequacies involving the men's restroom,  
11 claims that as a woman Plaintiff lacked standing to pursue under  
12 the ADA. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61  
13 (1992).

14 In assessing whether the lodestar figure should be adjusted,  
15 the Court must consider the extent to which Plaintiff prevailed  
16 on the demands presented, especially if she did not succeed on  
17 such demands in their entirety. Schwarz v. Sec'y of Health &  
18 Human Servs., 73 F.3d 895, 901 (9<sup>th</sup> Cir. 1995). In cases  
19 achieving partial success, courts must follow a two-part analysis  
20 in deciding whether to reduce an attorneys' fee award:

21 First, the court asks whether the claims upon which the  
22 plaintiff failed to prevail were related to the plaintiff's  
23 successful claims. If unrelated, the final fee award may  
24 not include time expended on the unsuccessful claims. If  
25 the unsuccessful and successful claims are related, then the  
26 court must apply the second part of the analysis, in which  
27 the court evaluates the 'significance of the overall relief  
28 obtained by the plaintiff in relation to the hours  
reasonably expended on the litigation.' If the plaintiff  
obtained 'excellent results,' full compensation may be  
appropriate, but if only partial or limited success' was  
obtained, full compensation may be excessive. Such  
decisions are within the district court's discretion.



1 Id. at 901-02. In determining whether the unsuccessful and  
2 successful claims are related,

3 ...the test is whether relief sought on the unsuccessful  
4 claim is intended to remedy a course of conduct entirely  
5 distinct and separate from the course of conduct that gave  
6 rise to the injury on which the relief granted is premised.  
7 Thus, the focus is to be on whether the unsuccessful and  
8 successful claims arose out of the same course of conduct.

9 Id. at 903, quoting Thorne v. City of El Segundo, 802 F.2d 1131,  
10 1141 (9<sup>th</sup> Cir. 1986). If a court finds the unsuccessful claims  
11 to be unrelated to the successful claims, it may either attempt  
12 to identify specific hours that should be eliminated or simply  
13 reduce the award to account for the limited success. Id. at 904.

14 In the present matter, the Court finds it appropriate to  
15 reduce the lodestar figure based on Plaintiff's limited success,  
16 as demonstrated by the fact that she ultimately prevailed by way  
17 of settlement on just more than half of ADA violations she  
18 originally identified. Each of violations claimed by Plaintiff  
19 represent different and unrelated claims that are premised on  
20 different sections of the ADA Accessibility Guidelines to  
21 determine liability. Claims pertaining to the accessibility of  
22 plastic bags in the produce department, for example, are  
23 completely separate from claims relating to checkstand height, or  
24 to claims involving restroom access. Consequently, Plaintiff's  
25 claims relating to the men's bathroom, with respect to which she  
26 failed to prevail, are both unrelated and distinct. Because it  
27 is impossible to apportion attorneys' fees between these  
28 unsuccessful claims from the claims upon which Plaintiff did  
prevail with any degree of certainty, the Court reduces  
Plaintiff's award of attorneys' fees by twenty percent to account

1 for her limited success. Twenty percent of the \$9,877.50  
2 lodestar is \$1,975.50. Total fees awarded for Plaintiff's  
3 claimed attorney/paralegal fees will thus be \$7,902.00.

4 Lastly, Plaintiff may recover, as part of the award of her  
5 fees in this matter, litigation expenses pursuant to 42 U.S.C. §  
6 2205. The term "litigation expenses" in Section 12205 has been  
7 interpreted to include "the same out-of-pocket expenses that are  
8 recoverable under 42 U.S.C. § 1988." Robbins v. Scholastic Book  
9 Fairs, 928 F. Supp. 1027, 1037 (D. Or. 1996). Under Section  
10 1988, Plaintiff recover those out-of-pocket expenses that "would  
11 normally be charged to a fee paying client." Harris v.  
12 Marhoefer, 24 F.3d 16, 19 (9th Cir. 1994).

13 As stated above, Plaintiff seeks a total of \$5,927.64 in  
14 litigation expenses. Of that amount, SaveMart has contested only  
15 the \$4,401.25 sought for expert fees and costs submitted by  
16 Plaintiff's expert, Joe Card. SaveMart claims that Mr. Card's  
17 invoices should be rejected in their entirety because they do not  
18 provide enough detail for the Court to discern whether the  
19 requested amount is reasonable. Plaintiff has submitted,  
20 however, two invoices from Mr. Card which furnish seven different  
21 time entries showing the tasks performed and the hourly rate.  
22 Plaintiff has also submitted Mr. Card's opinion and report which  
23 detail the accessibility violations he identified.<sup>2</sup> Hence Mr.  
24 Card's invoices are sufficiently detailed and are properly

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26 <sup>2</sup>While SaveMart also claims that a total of \$1,523.75 for  
27 draftsman services contained within Mr. Card's invoice is not  
28 factually supported, the Card report contains architectural  
drawings pertaining to many of the claimed violations that appear  
to be the product of those services.

subject to reimbursement.

**CONCLUSION**

Based on the foregoing, Plaintiff is entitled to reasonable attorneys' fees in the amount of \$7,902.00 and reasonable litigation expenses in the amount of \$5,927.64, for a total of \$13,829.64. Plaintiff will accordingly be awarded that amount.<sup>3</sup>

IT IS SO ORDERED.

DATED: October 20, 2005



MORRISON C. ENGLAND, JR.  
UNITED STATES DISTRICT JUDGE

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<sup>3</sup>Because oral argument would not be of material assistance, this matter was deemed suitable for decision without oral argument. E.D. Local Rule 78-230(h).